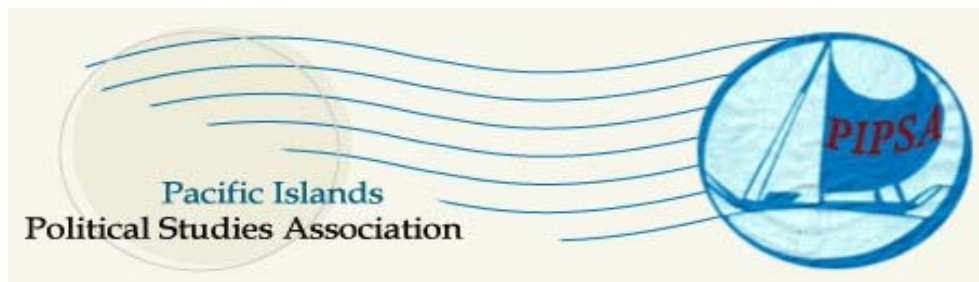


To Ratify or Not to Ratify? An assessment of the case for ratification of international human rights treaties in the Pacific

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Introduction

The Pacific region³ has the lowest regional rate of ratification of international human rights treaties in the world. There is currently considerable pressure on Pacific Island states from various quarters to ratify⁴ the core human rights treaties.⁵ Intuitively, ratification of human rights treaties should support more effective governance, and therefore contribute to security and stability in the Pacific. Will it?

This paper explores whether ratifying human rights treaties is a useful way to advance the cause of human rights in the Pacific. Part I of the paper takes a current “snapshot” of the ratification project in the Pacific by setting out the current levels of ratification, looking at the reasons for low ratification, and noting the recent calls for greater ratification. Part II sets out the key consequences for states of ratifying international human rights treaties, and then looks at the benefits and drawbacks of ratification. In light of this context, Part III considers strategies Pacific states might adopt in responding to the call for ratification.

Part I: Snapshot of Ratification of Human Rights Treaties in the Pacific

² This paper is a work-in-progress, so feedback is very welcome. Please send comments to natalie.baird@canterbury.ac.nz

³ “Pacific” is used throughout the paper to mean the 14 island members of the Pacific Islands Forum: Cook Islands, Fiji Islands, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu. It is noted that this includes the Cook Islands and Niue. These are both self-governing states in free association with New Zealand. The extent to which they are bound by some international human rights treaties depends on New Zealand treaty action. Until 1981, New Zealand ratification of treaties impliedly included the territories of the Cook Islands and Niue. From 1981-1988, New Zealand adopted the practice of ascertaining whether the Cook Islands and Niue wished to be bound by New Zealand’s treaty action, and stating this explicitly in its instruments of multilateral treaty action. Since 1988, it has been clear that the Cook Islands and Niue can become party to treaties in their own right.

⁴ I use the word “ratify” somewhat loosely to include any act of becoming party to a treaty. It therefore includes acts of accession (where a State accedes to a treaty, instead of following the two-step procedure of signature followed by ratification) or succession (where a State succeeds to the treaty obligations of all or part of the territory of another State. The key point for the purpose of this paper is that ratifying, acceding to, or succeeding to a treaty (collectively referred to in this paper as “ratifying”) means that a state becomes a party to the treaty and incurs legal obligations.

⁵ These are: the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CRMW), the Convention on the Rights of Persons with Disabilities (Disability Convention), and the International Convention for the Protection of All Persons from Enforced Disappearance (the Disappearance Convention). Until recently, the “core” treaties were regarded as the first six of these. With the coming into force of CRMW in 2003, and the recent conclusion of the Disability and Disappearance Conventions, the United Nations High Commissioner for Human Rights now regards the nine treaties as the “core” human rights treaties.

The current level of ratification

CRC and CEDAW are currently the most widely ratified treaties in the Pacific. All Pacific states are party to CRC. Most states, except Nauru, Palau and Tonga, are party to CEDAW. Some states are party to ICESCR and CERD. No states are party to CAT or CRMW. While the recently concluded Disability and Disappearance Conventions have a couple of Pacific signatories, no state has yet ratified these treaties. See Table One for detailed information by country of ratifications of the core treaties.

Table One: Ratification of Core International Human Rights Treaties in the Pacific⁶ Key: a – accession d – succession s – signature only

Country	ICESCR	ICCPR	CERD	CEDAW	CAT	CRC	CRMW	Disability	Disappearance
Cook Islands	28 Dec 78 ⁷	28 Dec 78 ⁶	22 Nov 72 ⁶	10 Jan 85 ⁸ 11 Aug 06 ⁹		6 Jun 97 a			
FSM				1 Sep 04		5 May 93 a			
Fiji			11 Jan 73 d	28 Aug 95 a		13 Aug 93			
Kiribati				17 Mar 04 a		11 Dec 95 a			
Marshall Islands				2 Mar 06		4 Oct 93			
Nauru		12 Nov 01 s	12 Nov 01 s		12 Nov 01 s	27 Jul 94 a			
Niue	28 Dec 78 ⁶	28 Dec 78 ⁶	22 Nov 72 ⁶	10 Jan 85 ⁷		20 Dec 95 a			
Palau						4 Aug 95 a			
Papua New Guinea			27 Jan 82 a	12 Jan 95 a		1 Mar 93			
Samoa				25 Sep 92 a		29 Nov 94			6 Feb 07 s
Solomon Islands	17 Mar 82 d		17 Mar 82 d	6 May 02 a		10 Apr 95 a			
Tonga			16 Feb 72 a			6 Nov 95 a			
Tuvalu				6 Oct 99 a		22 Sep 95 a			
Vanuatu				8 Sep 95 a		7 Jul 93		17 May 07 s	6 Feb 07 s

Why is there low ratification of human rights treaties in the Pacific?

Reasons for low ratification of human rights treaties fall into two distinct categories – the practical and the philosophical. At the practical level, geographical and political isolation may play a role.¹⁰ There is perhaps a feeling that international conventions

⁶ This information is as at 15 August 2007, and is drawn from the following sources: <<http://www.ohchr.org>> <<http://www.bayefsky.com>> and New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006), Appendix 5.

⁷ Advice of the New Zealand Ministry of Foreign Affairs and Trade is that the Cook Islands and Niue are bound by these treaties by virtue of New Zealand's ratification. Although New Zealand's reports previously contained information on Niue and the Cook Islands, they no longer do so.

⁸ The instrument of ratification indicates that it is extended to the Cook Islands and Niue in accordance with their special relationship with New Zealand.

⁹ Despite already being party to this treaty by virtue of New Zealand's ratification, the Cook Islands has made a separate act of accession.

¹⁰ OHCHR, UNDP, UNFPA, UNIFEM, UNICEF *Advancing the Implementation of Human Rights in the Pacific: Compilation of Recommendations of the United Nations Human Rights Treaty Bodies to the Countries of the Pacific* (OHCHR, UNDP, UNFPA, UNIFEM, UNICEF, Suva, 2007), vii.

apply to larger countries, and are not designed for small, developing states.¹¹ In particular, adopting any new international obligation will be a drain on limited resources. Most Pacific states have limited human resources for engaging in foreign policy.¹² Faced with such limitations, competing regional and international obligations often appear more pressing. These include terrorism, organised crime, money laundering, fisheries, shipping and climate change. In terms of the human rights nature of the treaties, there may be a lack of good information about the benefits of ratification, and perhaps a desire to avoid international scrutiny of domestic practices.¹³ A very practical concern is the ability to meet the ongoing reporting requirements of international human rights treaty bodies.

More fundamentally, reasons for low ratification include a concern that the values underlying human rights treaties do not “fit” with Pacific values. These concerns go to the very heart of the human rights project. Pacific scholar Konai Helu Thaman puts it this way:¹⁴

“My own view is that the delay of the full entry of Pacific Island nations into international debates on human rights may be due to the fact that, as with many ideas that emanate from the international community, it was assumed that the concept of human rights was self-evident, universal, culture-free and gender neutral! Such assumptions were at best naïve and at worst arrogant, because most international covenants are based on Western liberal beliefs and values, and like all beliefs and values, they are embedded in a particular cultural agenda where indigenous peoples together with their assumptions and values have been and continue to be disregarded and marginalised.”

Linked to this, it has been noted that Pacific states may resist ratification as an “expression of hostility against what they consider to be forced ratification by the superpowers, and even the UN, and their hegemonic attitudes.”¹⁵ Part of the concern here is potential conflict between local customary practices and universal human rights. Unlike larger states, Pacific governments are inherently weak, relying on communities being able to govern themselves. This means that Pacific states need to take care not to upset traditional community and church leaders who play a key role in domestic governance.¹⁶ Hence, Pacific states may be wary of ratifying treaties which might upset these stakeholders.

¹¹ Elise Huffer “Baseline Survey on the Status of Pacific Island Countries’ Ratification of Main Human Rights Instruments and their Possible Reservations, Traditional Governance Practices that could support Human Rights, and the Work of Other Agencies and Organisation in Promoting Human Rights in the Pacific” (October 2003), 8.

¹² Elise Huffer “Baseline Survey on the Status of Pacific Island Countries’ Ratification of Main Human Rights Instruments and their Possible Reservations, Traditional Governance Practices that could support Human Rights, and the Work of Other Agencies and Organisation in Promoting Human Rights in the Pacific” (October 2003), 7.

¹³ New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006), para 5.35.

¹⁴ Konai Helu Thaman in Margaret Wilson and Paul Hunt *Culture, Rights and Cultural Rights: Perspectives from the South Pacific* (Huia Publishers, Wellington, 2000), 2-3.

¹⁵ P Imrana Jalal “Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties” (RRRT/UNDP, Suva, April 2006), 16.

¹⁶ Elise Huffer “Baseline Survey on the Status of Pacific Island Countries’ Ratification of Main Human Rights Instruments and their Possible Reservations, Traditional Governance Practices that could

The call for greater ratification

There have been a number of calls for Pacific ratification of the core treaties. The United Nations periodically calls on member states to ratify the core treaties. At the regional level, ratifying and implementing the core treaties is identified as one of the goals of the Pacific Plan. The vision of Pacific leaders is for a region “respected for the quality of its governance, the sustainable management of its resources, the full observance of democratic values, and for its defence and promotion of human rights.” Initiative 12.5 in the Plan is to “ratify and implement international and regional human rights conventions.”¹⁷

In 2006, the Pacific Office of the High Commissioner for Human Rights commissioned a paper promoting the “added value” for the Pacific in ratifying the core treaties.¹⁸ The paper sought to examine and promote the links between human rights and development – specifically the development aims of the Pacific Plan and the Millennium Development Goals. The key thesis of the paper is that ratifying human rights treaties will assist in improving development, promoting economic growth and reducing poverty.

Major aid donors including Australia, New Zealand and the European Union also promote ratification of the core human rights treaties. Local and international NGOs press for ratification. Various regional workshops and meetings urge treaty action,¹⁹ and academics promote ratification.²⁰

The issue

In light of the emphasis on ratifying human rights treaties, it is important to consider the consequences of ratification. Assuming that a goal of all stakeholders (states, UN agencies, donors, civil society and individuals) is advancing the cause of human rights, and better protecting and promoting the human rights of individuals and groups in the Pacific region, the issue addressed in the remainder of this paper is whether ratifying human rights treaties is an effective strategy to achieve this.

support Human Rights, and the Work of Other Agencies and Organisation in Promoting Human Rights in the Pacific” (October 2003), 12.

¹⁷ The October 2006 Nadi decisions on the Pacific Plan also identified ratification and implementation of human rights conventions as one of the priorities for the Plan in the subsequent 12 months.

¹⁸ Office of the United Nations High Commissioner for Human Rights *Ratification of International Human Rights Treaties: Added Value for the Pacific Region* (draft paper, 19 March 2007). As at 7 November 2007, it appears that this paper has not yet been finalised. An earlier version of the paper, prepared by consultant P Imrana Jalal, is however available on the website of the Regional Rights Resource Team. P Imrana Jalal “Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties” (RRRT/UNDP, Suva, April 2006), available at <www.rrrt.org>. The April 2006 Jalal version of the paper is cited in this paper.

¹⁹ See for example “Conclusions and Recommendations of the Colloquium and Workshop for Judges and Lawyers on the Justiciability of Economic, Social and Cultural Rights in the Pacific Region” (Suva, Fiji, 1-3 June 2006), para 16; and “Concluding Statement: Commonwealth Pacific Regional Workshop on the Ratification of International Human Rights Instruments under the Pacific Plan” (Port Moresby, Papua New Guinea, 28-30 March 2007).

²⁰ See for example Dejo Olowu “The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific” (2006) 7 Melbourne Journal of International Law 155.

Part II: Assessing the Case for Ratification

What are the consequences of ratifying human rights treaties?

Ratification should not be lightly entered into. It is irresponsible for advocates to promote, or states to take, a “ratify now, think about the consequences later” approach. Unless ratification is to be no more than political window-dressing, the implications of ratification need to be carefully considered before states take action.

Ratification incurs legal obligation

Once a treaty has been ratified, a state incurs immediate legal obligations at international law. This is illustrated by the distinction between “signature” of a treaty and subsequent “ratification.” Signature of a treaty usually indicates that a state intends to become party to a treaty at some future date. Until ratification at that future date, although a state is required to do nothing which would frustrate the object and purpose of the treaty, there is no legal obligation on the state. In contrast, once a state has ratified a treaty, it must conform to all the obligations set down in a treaty and it cannot generally avoid them without a good excuse. In particular, a state cannot use as an excuse for failing to fulfil international obligations the fact that its domestic law prevents compliance with the international obligations. If a state anticipates that its domestic law will prevent it from complying with the requirements of a treaty, but it nevertheless wishes to ratify the treaty – perhaps because it complies in most other areas, or intends to amend domestic law in due course - then the proper course is to ratify a treaty with a reservation. Ideally then, a state should not ratify a treaty until its domestic laws and policies comply with the international legal requirements.

Implementation of treaty requirements

The major - and most important - requirement of ratifying an international human rights treaty is to give domestic effect to the treaty’s provisions. Domestic implementation is the most effective way of enforcing international human rights treaties. A state needs to give effect to the treaty in its domestic law, so that individuals – the beneficiaries of international human rights treaties – are able to enforce their rights at home.

For each treaty, the extent of domestic legislation required will depend on whether the state’s legal system allows for ratified treaties to have direct legal effect, the nature of the obligations imposed by the treaty, and the existing state of a country’s statute book. For example, most Pacific constitutions already provide protection for many civil and political rights. If the ICCPR were to be ratified, then although legislative change might be required, it may not be as extensive as it would be for other treaties. Ratification may also require significant changes to government policies. Government officials will need to be trained. Culture shifts may be required. New systems for data collection may be needed. Establishment of a national human rights institution might be needed to support implementation.

Periodic reporting

A key practical consequence of ratification is that states incur reporting obligations. Each human rights treaty establishes an independent committee of experts who oversee the implementation of the treaty. One of the key functions of each committee is to monitor state compliance with treaty obligations by way of periodic state reports.

The reporting obligation incurred by states varies according to the terms of the treaty but commonly involves submission of an initial periodic state report to the committee within one-two years of ratification, followed by regular periodic updates. Aside from the Disappearance Convention which does not have an ongoing reporting obligation, the reporting interval varies for each treaty, and ranges from two years under CERD to five years under ICESCR, CRC and CRMW.

Reporting is complex and time-consuming. Most committees release guidelines on the content of state reports but Pacific states see the reporting guidelines as onerous, geared for larger states, and based on assumptions that are not relevant in the Pacific (eg about the size of the Executive or the data that is available for reporting purposes).²¹ Along with others, Pacific states have had difficulty meeting their reporting obligations. It can be difficult to maintain momentum during the reporting process – changes in government, movement of key personnel and traumatic environmental events can all result in long delays.²² See table 2 for more detail of reporting by country.

Table Two: Reporting Status of Pacific Island States²³

Country	Ratified treaties	Reports submitted	Reports overdue ²⁴
Cook Islands ²⁵	CRC	nil	1 st , 2 nd
	CEDAW	1 st	nil
Federated States of Micronesia	CRC	1 st	2 nd , 3 rd
	CEDAW	nil	1 st
Fiji Islands	CRC	1 st	2 nd , 3 rd
	CEDAW	1 st	2 nd , 3 rd
	CERD	1 st , 2 nd & 3 rd (combined), 4 th , 5 th , 6 th & 7 th & 8 th & 9 th & 10 th & 11 th & 12 th & 13 th & 14 th & 15 th (combined), 16 th & 17 th (combined)	nil
Kiribati	CRC	1 st	Nil
	CEDAW	nil	1 st
Marshall Islands	CRC	1 st , 2 nd	nil
	CEDAW	nil	1 st
Nauru	CRC	nil	1 st , 2 nd , 3 rd
Niue ²⁶	CRC	nil	1 st , 2 nd

²¹ Pacific Human Rights Issues Series 1: *National Human Rights Institutions: Pathways for Pacific States* (Pacific Islands Forum Secretariat and New Zealand Human Rights Commission, July 2007), 39.

²² Pacific Human Rights Issues Series 1: *National Human Rights Institutions: Pathways for Pacific States* (Pacific Islands Forum Secretariat and New Zealand Human Rights Commission, July 2007), 39.

²³ Information drawn from <www.bayefsky.com> and current as at July 2007.

²⁴ Treaty bodies have adopted the practice, in their concluding observations on a state's report, of inviting states with significantly overdue reports to subsequently submit consolidated reports. If this has occurred, the deadline has in essence been extended, and so reports previously overdue are no longer overdue. In such situations, the status is therefore noted as "nil" overdue reports.

²⁵ Table One notes that ICESCR, ICCPR, and CERD apply to the Cook Islands, by virtue of New Zealand's ratification of these treaties. This is the advice of the New Zealand Ministry of Foreign Affairs and Trade. However, the relevant treaty bodies do not require reports from the Cook Islands for these treaties and so they are not noted in this table.

Palau	CRC	1 st	2 nd
Papua New Guinea	CRC	1 st	nil
	CEDAW	nil	1 st , 2 nd , 3 rd
	CERD	1 st	2 nd , 3 rd , 4 th , 5 th , 6 th , 7 th , 8 th , 9 th , 10 th , 11 th , 12 th , 13 th
Samoa	CRC	1 st	nil
	CEDAW	1 st & 2 nd & 3 rd (combined)	nil
Solomon Islands	CRC	1 st	2 nd & 3 rd (consolidated)
	CEDAW	nil	1 st , 2 nd
	CERD	1 st	2 nd , 3 rd , 4 th , 5 th , 6 th , 7 th , 8 th , 9 th , 10 th , 11 th , 12 th , 13 th
	ICESCR	1 st	2 nd
Tonga	CRC	nil	1 st , 2 nd
	CERD	1 st , 2 nd , 3 rd , 4 th & 5 th (combined), 6 th , 7 th , 8 th , 9 th & 10 th (combined), 11 th & 12 th & 13 th (combined), 14 th	15 th , 16 th , 17 th , 18 th
Tuvalu	CRC	nil	1 st , 2 nd
	CEDAW	nil	1 st , 2 nd
Vanuatu	CRC	1 st	2 nd , 3 rd
	CEDAW	1 st & 2 nd & 3 rd (combined)	nil

There has been frustration with the treaty body system for a number of years, and a proposal currently being considered is for one unified standing treaty body. This would mean that instead of reporting to nine separate treaty bodies, states would be required to prepare one comprehensive report, and appear before one committee. Currently, states are considering proposals for reform, and considerable negotiation is likely to be required before any reform is achieved. If reforms proceed, there will be benefits for smaller states as the “compliance burden” will be reduced.

Individual communications

Many of the human rights treaties or their additional optional protocols also allow for individuals to submit communications to the treaty body alleging that the state has violated their rights under the relevant treaty. Currently, there are few Pacific states in which individuals are able to take communications to treaty bodies.²⁷ To date, there have been no individual communications to treaty bodies concerning those Pacific states the subject of this paper.

What are the benefits of ratifying human rights treaties?

In this part of the paper, I look first at “benefits” of ratifying treaties, and secondly at “drawbacks.” This division and naming is somewhat artificial. It tends to present ratification as either “good” or “bad” when the picture is more complex than that. Similarly, the separation within each section into benefits/drawbacks for the “human rights cause” on the one hand and for “states” on the other is also artificial. Benefits for the human rights cause will almost always be benefits for states. However, given that it is states that ultimately have to respond to the call for ratification, there is still some utility in maintaining this split.

Benefits for the human rights cause

²⁶ Table One notes that ICESCR, ICCPR, CERD and CEDAW apply to Niue by virtue of New Zealand’s ratification of these treaties. However, the relevant treaty bodies do not require reports from Niue for these treaties and so they are not noted in this table.

²⁷ The Solomon Islands and Vanuatu are party to the CEDAW Optional Protocol enabling individuals to take complaints to the CEDAW Committee.

Of human rights

The most important benefit is the actual improvement in the human rights of individuals and groups. Greater realisation of human rights has the potential to empower the disadvantaged and marginalised, and contribute to a more just, inclusive and fairer society. Ultimately, a state with a strong commitment to human rights is likely to be a state which is well governed, secure and stable.

Even though the Pacific region is not known for gross violations of human rights, ratification and implementation of treaties should nevertheless support improvements in human rights in all areas of life. The process of ratification, especially if accompanied by wide consultation, can itself raise awareness of the particular rights at stake, and improve human rights literacy.²⁸ The experience with CRC in the Pacific suggests that its ratification has contributed to better human rights for children. CRC is said to be one of the factors leading to the decline of infant mortality rates, the provision of quality education for children, and the development of legislation against child pornography.²⁹ More historically, one of the significant “contributions” of the human rights movement to the Pacific region is the role it played in supporting decolonisation.³⁰

Of enforceability

A benefit sometimes claimed of ratifying international human rights treaties is that this ensures “enforceability” of the rights. In the development context, it has also been argued that given the absence of an enforcement mechanism for achieving the objectives in the Pacific Plan and the Millennium Development Goals, the enforcement regime of the international human rights framework can enforce not only human rights but also the overlapping aims of these development plans.³¹

As noted above, ratification means that a state is subject to the reporting requirements of the particular treaty, and states may also choose to adopt additional procedures to enable individuals to take petitions to the relevant treaty body. While these two processes are a means of “enforcing” treaty obligations, even with an optimistic lens, they can only really be described as “soft” enforcement. There is no international police force. There is no system of fining a state or imposing any other penalty. Recommendations of treaty bodies, whether in periodic reports or in response to individual communications, are just that. They depend on the goodwill of the state for their implementation. Taken in this light, the “enforceable” nature of human rights treaties might be seen as a marginal benefit, or perhaps even an illusory one.

²⁸ See Elise Huffer “Baseline Survey on the Status of Pacific Island Countries’ Ratification of Main Human Rights Instruments and their Possible Reservations, Traditional Governance Practices that could support Human Rights, and the Work of Other Agencies and Organisation in Promoting Human Rights in the Pacific” (October 2003), 4.

²⁹ P Imrana Jalal “Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties” (RRRT/UNDP, Suva, April 2006), 23 and 33.

³⁰ P Imrana Jalal “Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties” (RRRT/UNDP, Suva, April 2006), 22.

³¹ P Imrana Jalal “Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties” (RRRT/UNDP, Suva, April 2006), 37.

On the other hand, while the benefit of enforceability is sometimes overstated, what the reporting procedure does do is ensure regular, external and independent scrutiny of a state's compliance with its human rights obligations. The periodic nature of reporting also encourages a state, and civil society, to regularly reflect on the state of human rights.

Of universality, indivisibility and inalienability

There are a number of clear benefits to the human rights movement if Pacific states ratify the core treaties. At the global level, ratification of human rights treaties by more states, particularly those from non-western backgrounds, strengthens the claim to universality of human rights. It also strengthens the development of a common language of human rights. Over time, it will contribute to the development of customary international law on human rights.

At the local level, the constitutions of many Pacific states contain most of the civil and political rights. This means that, at least in the formal legislative sense, civil and political rights are given domestic primacy ahead of economic, social and cultural rights. Ratification of more treaties – particularly ICCPR and ICESCR – would help to confirm the indivisibility and interdependence of rights. Giving domestic legal effect to economic, social and cultural rights may also help allay Pacific concerns about the individual focus of rights. Economic, social and cultural rights are typically more group-oriented than civil and political rights, and so these rights may have more synergy with Pacific values of group harmony.

Ratification of human rights treaties would also strengthen the claim of the rights protected by the treaty to inalienability. Although human rights belong to individuals by virtue of their humanity, the stronger their legal protection, the stronger their claim to inalienability. From a practical point of view, if a state wishes to revoke its human rights protections, it has to revoke not only its domestic legislation, but also withdraw from the relevant treaty.

Benefits for states

Of definite obligation

A possible benefit of ratification for states is the certainty which ratification brings to the nature and extent of its human rights obligations. There are two aspects to this. First, even where a state has not ratified a treaty, or where a state has ratified a treaty but not yet given it domestic legal effect, the courts will sometimes derive obligations on states from those treaties. The orthodox legal approach is for a court to decline to give effect to a treaty unless a state has both ratified the treaty and given domestic legal effect to it.³² However, in some cases, the courts will refer to a ratified but unincorporated treaty to support domestic legal obligations by way of an aid to interpretation of legislation.³³ In others, a court may take an even more expansive and

³² For example, in *Tepulolo v Pou & Attorney-General* (Family Appellate Court Case No 17/2003, 24 January 2005, Ward CJ), the Court stated that it could not apply CRC or CEDAW unless an Act of Parliament was passed to implement their provisions.

³³ See for example *Attorney-General v Maumasi* (Court of Appeal, Samoa, 27 August 1999): “All Samoan Courts should have regard to [CRC] in cases within its scope.”

rights-centred approach and place obligations on a state even in relation to an unratified treaty.³⁴ While such approaches are of clear benefit to the human rights cause, for states, there is undoubtedly an element of unwelcome surprise to find themselves measured against the standards in an international treaty which it has either not ratified, or not yet incorporated. Better then, it might be argued, to make a firm commitment to particular treaties, so that there is certainty around the nature of a state's human rights obligations.

The second area of uncertain obligation concerns customary international law. Customary international law is law which states consider requires them to act or refrain from acting in a particular way. There is ongoing debate as to which aspects of international human rights law have become customary international law. Some commentators argue that the entire Universal Declaration of Human Rights has become customary international law.³⁵ Others say that while this is unlikely, then at least the rules relating to right to life, the prohibition of torture, the prohibition of slavery, the prohibition of arbitrary detention, and the prohibition of institutionalised discrimination have become rules of customary international law.³⁶ Customary international law can be used to hold states to account at both the international and domestic levels.³⁷ Unlike customary international law, international human rights treaties have the major benefit of certainty around the extent and nature of a state's obligation.

Of human rights and development

An important argument is that the human rights framework adds value to the agenda of development. Ratification of the human rights treaties will support an integrated human rights based approach to development. Realisation of human rights is critical to the success of the development objectives in the Pacific Plan. Human rights, good governance and economic prosperity go hand in hand.³⁸

Of technical assistance and training

In preparing for ratification, technical assistance from UN agencies, multilateral and bilateral donors and NGOs may be available. Ratification of CEDAW by various

³⁴ For example in *Naylor v Foundas* [2004] VUCA 26; Civil Appeal Case 8/2004 Court of Appeal Vanuatu (5 November 2004), a case concerning contempt proceedings for default on a monetary judgment, the Court referred to the ICCPR requirement that no one is to be imprisoned on the grounds of failure to fulfil a contractual obligation - even though Vanuatu is not party to ICCPR.

³⁵ See Hurst Hannum "The Status of the Universal Declaration of Human Rights in National and International Law" (1995) 25 Georgia Journal of International and Comparative Law 287.

³⁶ Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 2003), 23.

³⁷ The extent to which it can be used by domestic courts will depend on whether the state recognises customary international law as a source of (domestic) law. Most states do recognise customary international law as a source of law. However, it would require a well-informed domestic court to apply customary international law against a state. Submissions based on customary international law have been considered from time to time in Pacific courts. See for example *Application by Ireuw, Wawar, Ap, and Wakum* [1985] PNGLR 430 (13 December 1985) where the National Court of PNG considered a submission that the rule of non-refoulement of refugees was customary international law.

³⁸ For a major proponent of this argument, see P Imrana Jalal "Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties" (RRRT/UNDP, Suva, April 2006).

Pacific states would not have occurred but for the technical support provided by women's groups, NGOs, the Pacific Women's Bureau of the Secretariat of the Pacific Community, RRRT, UNIFEM, donors and development agencies.³⁹ Once a treaty has been ratified, there is likely to be ongoing opportunities for further technical assistance in implementing the treaty. This may be especially so where the relevant treaty has a dedicated UN agency such as UNICEF for CRC. There are a number of possibilities here such as the development of model legislation suited to the Pacific region, support in establishing national human rights commissions, technical assistance in writing state reports and training for officials.

Of external opportunities

Ratification of more of the core treaties might be useful to support efforts to attract foreign capital, trade, aid and political support. Private investors and potential trading partners may be more likely to invest in countries with a strong commitment to human rights. Such a commitment may be perceived as providing some assurance that the country is less likely to erupt into civil unrest. At the human level, those who invest in ethical investment funds, or seek to undertake responsible tourism may rely on a state's commitment to human rights to support their decisions.

Of reputation

A final benefit of ratification is the reputational advantage to states. Ratification of more of the core treaties is likely to increase a state's standing as a member of the international community. It will contribute to the perception of a state as a good global citizen.

What are the drawbacks of ratifying human rights treaties?

For many human rights advocates, raising the question of whether there are disadvantages in ratifying human rights treaties will be deeply provocative. However, when faced with states apparently reluctant to ratify, it is a question worth exploring.

Drawbacks for the human rights cause

Of Western hegemony

Ratification of human rights treaties may mean that the scope for states to claim a different approach to rights, or an appreciation of rights tailored to a different cultural context, diminishes. This is a very real concern in the Pacific where the feeling that human rights is an unwanted form of globalisation is strong. International human rights standards may be seen as failing to take account of national, or indeed local, peculiarities. A "universal" approach to rights is seen as undermining cultural difference which for many small states, or small minorities, is all they feel they have left in a globalized world.⁴⁰ A particular issue is the relationship between custom and human rights, and a concern that human rights "trumps" custom.⁴¹

³⁹ P Imrana Jalal "Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties" (RRRT/UNDP, Suva, April 2006), 8.

⁴⁰ Elise Huffer "Baseline Survey on the Status of Pacific Island Countries' Ratification of Main Human Rights Instruments and their Possible Reservations, Traditional Governance Practices that could

For Pacific states, this potential drawback requires close consideration. While the Western origins of the human rights movement cannot be denied, nor can the fact that significant sectors of Pacific populations are already committed to human rights and see a strong resonance between human rights and their own values. Perhaps the real question is the extent to which the international human rights framework is able to accommodate a Pacific conception of “human dignity,” and the extent to which Pacific rights advocates are able to “translate” the international framework into local understandings.

Of jurisdictional layers

One drawback of focusing on ratification is that it may divert energy away from more viable frameworks for protecting rights. Given scarce resources, it is important that they be used where they will have the biggest impact. It may be that national frameworks, or perhaps a regional Pacific framework, are more likely to have a greater positive impact on human rights than the international framework.

Of impact

A potential drawback is that the “promise” of international human rights treaties may not be realised. The claimed benefits of ratification may turn out to be illusory, with no impact on human rights outcomes. This is because of the very real risk that human rights treaties will not touch the actions of the main rights transgressors in the Pacific. As noted above, Pacific governments are inherently weak. Traditional community and church leaders have a major governance role and often have a bigger impact on the lives of individuals than does the state. Significant breaches of individuals’ rights are committed by these “non-state actors” rather than the state. It is these non-state actors from whom individuals need protection. While some treaties seek to address actions of non-state actors,⁴² most are concerned with the actions of states. Although states must try and change the behaviour of their citizens, those who are directly breaching human rights are not targeted by the treaties. Although courts sometimes seek to apply rights “horizontally” between citizens (as opposed to “vertically” between citizens and the state),⁴³ the primary guarantor of human rights remains the state. Ratification then, with its consequences for Pacific governments rather than churches and traditional community leaders, may have only limited impact in terms of improving human rights outcomes.

Drawbacks for states

Of constitutions and sovereignty

support Human Rights, and the Work of Other Agencies and Organisation in Promoting Human Rights in the Pacific” (October 2003), 11.

⁴¹ For more detailed discussion of this issue, see New Zealand Law Commission Study Paper 17:

Converging Currents: Custom and Human Rights in the Pacific (NZLC, Wellington, September 2006).

⁴² See for example arts 2(f) and 5(a) CEDAW.

⁴³ See discussion in Miranda Forsyth “Is there Horizontal or Vertical Enforcement of Constitutional Rights in Vanuatu? *Family Kalontano v Duruaki Council of chiefs*” (2005) 9 *Journal of South Pacific Law*. And also Don Paterson “Human Rights in Island Countries of the South Pacific: A Challenge to Courts, Chiefs and Lawmakers” (Paper presented to the 16th Pacific Judicial Conference, Port Vila, 26-30 July 2005).

Ratification of human rights treaties may require significant constitutional amendment. For many states and their citizens, there is a strong sense of “ownership” of the constitution. For example, in Samoa’s report to the CRC Committee, a perception that human rights were introduced into the education system because of ratification of CRC and CEDAW was noted. “However, once they get the information on their human rights as stated in the Constitution, they then find it easier to accept the rights that are being taught in the context of CEDAW and CRC.”⁴⁴ If constitutional amendment was however required because of international obligations, this might be perceived as an intrusion on national sovereignty.

From a practical point of view, some constitutions have special amendment procedures requiring special majorities, or a referendum, or a constitutional convention. If constitutional change is required to give effect to international human rights treaties, then it may take considerable time to bring about.

For some states, there currently exists a window of opportunity to meet both these symbolic and practical concerns. States such as the Solomon Islands and Nauru are currently engaged in broad constitutional renewal exercises. Such exercises are ideal times to consider whether additional rights should be protected by the constitution. Considering such issues as part of a broader constitutional review process may ameliorate concerns about loss of national sovereignty.

Of resources

If ratification is to be meaningful, and something more than a signature on a piece of paper, then it requires financial and human resources. The scale of resources required varies from treaty to treaty. The resource implications are two-fold – upfront implementation costs and ongoing compliance costs. An example of the extent of resources required can be seen from the CEDAW legislative indicators project which provides a road map of 113 indicators for nine individual Pacific countries to use as they progress towards legislative implementation of their CEDAW obligations.⁴⁵ Even with donor assistance, ratification will result in significant costs for individual states.

Of periodic reporting

An aspect of the resources required relates to periodic reporting. Until some of the proposals in current treaty body reforms are realised, this challenge is huge for Pacific states. If they were to ratify all nine of the treaties, eight periodic reports and eight periodic dialogues with treaty bodies would be required.⁴⁶ This could conceivably result in an obligation to either report to or appear before a treaty body every year. Reporting requires extensive internal consultations, possibly the hiring of consultants to write the report, engagement with NGOs, and the gathering of data and statistics

⁴⁴ Committee on the Rights of the Child “Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Initial Report of States Parties Due in 1996: Samoa” (16 February 2006) CRC/C/WSM/1, para 191(b).

⁴⁵ Vedna Jivan and Christine Forster *Translating CEDAW Into Law* (UNDP and UNIFEM, Suva, May 2007).

⁴⁶ The Disappearance Convention requires an initial report, but does not require ongoing reporting.

from poorly resourced departments.⁴⁷ Once the report has been submitted, a team of public servants and a Minister is then required to travel to Geneva or New York to meet with the treaty body to discuss the report. For smaller Pacific states especially, the ongoing burden of reporting will be significant.

Part III: Ratification Strategies

In light of this assessment of the benefits and drawbacks of ratifying human rights treaties, four possible strategies to respond to the call for ratification are now considered.

Strategy one: Wholesale ratification

Wholesale ratification of the nine core human rights treaties is the strategy encouraged by the Office of the High Commissioner for Human Rights – on the basis that wholesale ratification reinforces the principles of indivisibility and interdependence of all human rights.⁴⁸ One argument in support of this approach is that selective ratification (of treaties targeting particular populations in particular) makes minorities more vulnerable, as it potentially preferences the rights of one group over another.

If a state were to ratify those of the nine core treaties not yet ratified, then both the immediate implementation requirements and the ongoing reporting requirements would be significant. Given resource constraints, there is potentially dishonesty in taking this approach, if it seems likely from the outset that, in the absence of significant additional resources, both the implementation and ongoing compliance obligations are unlikely to be met. It also needs to be noted that, at the global level, while a number of states have ratified six of the core treaties, few have ratified all nine. It would be a remarkable achievement for Pacific states, some of the smallest and most poorly resourced, to take a lead by way of wholesale ratification.⁴⁹

Aside from the practical resource issues, wholesale ratification is not a viable strategy in view of the widespread philosophical concerns with the human rights project. Wholesale ratification will further alienate those who have fundamental concerns with the underlying values in human rights treaties, and could lead to backlash.

Strategy two: No more ratification

A second strategy, at the other end of the spectrum, is for states to decide not to ratify any more of the core treaties. This strategy could underlie the current approach of a number of states – in particular because it responds to the practical and philosophical concerns about ratification. It needs to be noted too that this strategy does not necessarily mean that a state intends to violate human rights. Rather, a state, for various reasons, is simply choosing not to ratify a set of treaties, but it may still act in accordance with human rights values.

⁴⁷ P Imrana Jalal “Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties” (RRRT/UNDP, Suva, April 2006), 10.

⁴⁸ Get OHCHR source

⁴⁹ Note however that in other areas, where the benefits of ratification are perhaps more direct, ratification rates are high. See for example Kiribati’s ratification of recent IMO conventions.

This strategy is however an isolationist one. It means not only that the drawbacks of ratification are avoided, but so too are the potential benefits. In light of both the development focus and the human rights initiative in the Pacific Plan, such an approach would also be at odds with the agreed goals of the Pacific Plan.

Strategy three: Selective ratification

The unratified treaties do not all have to be ratified at once. Indeed, for Pacific states with resource constraints, and competing domestic, regional and international priorities, a gradual approach makes sense. In support of a gradual approach, it can be noted that the pattern for virtually all states has been a gradual one. Not only have treaties been concluded gradually, but nearly all states take a gradual approach to ratification.

What is needed is for Pacific states to undertake a prioritisation exercise and assess each treaty, in terms of the immediate consequences, and the likely benefits and drawbacks in terms of protection of human rights at the national level. While it is for individual states to assess which treaties are likely to be of most benefit to them, and for civil society to lobby according to its view of ratification priorities, some observations can be made.

ICCPR and ICESCR may be priorities on the basis that these two treaties, along with the 1948 Universal Declaration of Human Rights, represent the foundation of human rights and cover the main areas of civil, political, economic, social and cultural rights. With the development focus of the Pacific Plan, ICESCR is likely to be particularly important. ICESCR could also be a useful “shield” to respond to donors who seek to impose structural adjustment policies which would negatively impact on the economic and social rights protected by ICESCR.⁵⁰ The right to culture in ICESCR could also be used to address fundamental concerns about preservation of language, culture and tradition.

For ICCPR, most Pacific constitutions already provide protection for civil and political rights so minimal legislative adjustment may be all that is required. The rights protected by the ICCPR are also typically rights which require the state to refrain from taking certain actions. As such, they may require less expenditure and input of state resources than economic, social and cultural rights. Ratification of ICCPR might therefore be a “quick win.”

The treaties aimed at particular population groupings merit consideration. Given their targeted nature, ratification and implementation of these treaties is likely to lead to human rights gains for the target groups. These treaties are also ones around which civil society can effectively organise and mobilise. Given their specific beneficiary groups, they may be more likely to attract donor support and technical assistance. Only Nauru, Palau and Tonga have yet to ratify CEDAW, so this may, including for the additional reason of regional solidarity, be a priority. CEDAW is noted as a treaty requiring action under the human rights initiative of the Pacific Plan. The Pacific Plan

⁵⁰ Paul Hunt “Using Rights as a Shield” (2002) 6 Human Rights Law and Practice 111.

also refers to the Biwako Millennium Framework for the Disabled so the recently concluded Disability Convention may be a priority.

Action in relation to CERD is also listed as a milestone under the Pacific Plan's human rights initiative. As with civil and political rights, most Pacific constitutions already prohibit discrimination on the grounds of race, so minimal legislative adjustment may be required. On the other hand, for those Pacific states such as the Cook Islands and Niue, where the population is relatively homogenous, ratification of CERD may be a lower priority.

CRMW is aimed at providing protections for migrant workers and their families. Migration from, to and around the Pacific region is a notable feature of the region. Remittances are a key source of revenue. One argument here is that of reciprocity – as the region enjoys the benefits of remittances from migrant workers outside the region, there is a duty to respect the rights of migrant workers within the region.⁵¹ Particularly in the Northern Pacific where there are a large number of short-term migrant workers, with vulnerability to exploitation, CRMW may be higher up the priority list. Like CEDAW and CERD, it too is specifically noted in the milestone chart for the human rights initiative in the Pacific Plan.

Treaties which may be of lower priority are perhaps CAT and the recently concluded Disappearance Convention. Although instances of police brutality and poor prison conditions do arise, Pacific states do not face issues of systemic state-sanctioned torture. The Disappearance Convention is intended to combat situations of state-sponsored disappearances. This is not a problem in the Pacific, and in small societies such as Niue with its population of 1,625, is unlikely to ever be so. Ratification of this treaty would be a sign of international solidarity, but with limited benefits for national human rights, it would be a poor use of resources.

Practical considerations are also worth bearing in mind. For example, the frequency of the reporting requirement for the particular treaty should be considered. Under CERD, states are required to report every two years. Fiji, Tonga, PNG and the Solomon Islands have all struggled to meet these reporting requirements. This practical requirement might therefore make CERD a lower priority than a treaty with a five year reporting interval.

This type of prioritisation exercise, taking into account the subject matter of the treaty and practical issues, would indicate an order for gradual and selective ratification of non-ratified treaties. It might also indicate one or more treaties which a state, for fundamental reasons, may chose never to ratify.⁵²

Another type of selective ratification is ratification with reservations or declarations. A reservation indicates that a state does not intend to be bound by a particular provision – either because the state cannot bring its domestic law into line with the

⁵¹ P Imrana Jalal "Pacific Culture and Human Rights: Why Pacific Island Countries should ratify International Human Rights Treaties" (RRRT/UNDP, Suva, April 2006), 34.

⁵² For example, New Zealand has elected not to ratify CRMW because of "concerns about legislative inconsistency, the effects on immigration policy, deficiencies in the text and the lack of support by likeminded countries." See Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (Ministry of Foreign Affairs and Trade, Wellington, 2003), 64.

provision, or because the state does not agree with the provision. An advantage in ratifying with reservations is that it enables commitment to the majority of a treaty with some exclusions. This means a number of the benefits identified above are available. Reservations are also transparent as areas of potential difficulty are clearly indicated. However, reservations to human rights treaties are contentious particularly where the extent of a reservation undermines the goals of the treaty. For example, Kiribati has a declaration to CRC whereby it considers that a child's rights in the Convention, particularly those in articles 12-16 "shall be exercised with respect for parental authority, in accordance with the Kiribati customs and traditions regarding the place of the child within and outside the family." Reservations can also be a way of "parking" an issue which may disappear off the radar screen for years.⁵³

Strategy four: Strengthen alternative rights frameworks

A final strategy is to focus efforts on alternative rights frameworks. At the national level, all states (except Niue) currently have constitutional documents with human rights protections. Most of these are concerned with civil and political rights, although some also provide protection for economic and social rights. Although domestic rights requirements are not necessarily comprehensive, it may be that they are adequate in the meantime. Given limited state resources, focusing on strengthening the operation and implementation of these provisions may provide the most improvement in human rights in the short-term. Focusing on national frameworks may also mitigate some of the philosophical concerns with the human rights project. Where a state has a national human rights institution which can act as a focal point and generate momentum, this may be a particularly useful strategy. However, given the absence of national human rights institutions (except Fiji), or even a national human rights officer in the relevant ministry of justice, this approach may not currently be viable.

A regional human rights framework might offer a more effective means of promoting and protecting human rights. A major advantage of a regional approach is that it might provide a dialogue space for the philosophical concerns with the human rights project to be addressed, and a distinctively Pacific approach to rights to be developed. A regional mechanism could explore issues such as the areas of commonality between traditional values and human rights.⁵⁴ It could "translate" universal concepts into Pacific understandings. It could engage traditional and church leaders with the human rights project. It could collaborate with local NGOs. It could explore ways in which both a commitment to international human rights standards and an appreciation of the cultural context in which rights operate can be realised. While these issues can also be explored within the international framework, a regional framework might result in a greater sense of ownership, along with more prominence and momentum than is possible with the international framework.

⁵³ For further discussion of Pacific reservations, see Dejo Olowu "The United Nations Human Rights Treaty System and the Challenges of Commitment and Compliance in the South Pacific" (2006) 7 Melbourne Journal of International Law 155, 173-176.

⁵⁴ A 2003 Fijian survey found that 56% of respondents agreed that human rights principles were in harmony with traditional values and 44% thought that they were contradictory to traditional values. See Hegarty and Ratuva "Baseline Study on Civic Education Needs and Attitudes towards Democratic Governance" (2003), 40-41. A 2006 New Zealand Law Commission study advocated seeking out common values underlying custom and human rights as a means of resolving conflicts between them. See New Zealand Law Commission Study Paper 17: *Converging Currents: Custom and Human Rights in the Pacific* (NZLC, Wellington, September 2006).

Conclusion

In considering how to respond to the calls for ratification of international human rights treaties, Pacific states need to weigh up both the benefits and drawbacks of ratification. Amongst the likely benefits are better human rights for individuals, greater clarity around states' human rights obligations, a rights-based approach to development, and ultimately a more inclusive society. Practical benefits include access to foreign aid, trade, capital and technical assistance. On the other hand, there are some drawbacks. Ratification may limit the scope for states to claim a distinctively Pacific approach to rights. For resource reasons, there may be a risk of "hollow" ratification which has no impact on human rights outcomes. Even with strong implementation efforts, the behaviour of some key transgressors of rights may fall outside the reach of the treaties. Significant practical drawbacks include the possible need for constitutional amendment and the ongoing compliance burden in terms of financial and human resources.

There are a number of strategies which could be adopted by Pacific states in response to the call for ratification. Ideally, a response should maximise benefits and minimise drawbacks, as well as addressing both the practical resource concerns of ratification and the more philosophical concerns going to the heart of the human rights project. Wholesale ratification is unlikely to meet either the practical or philosophical concerns. At the other end of the spectrum, a strategy of ratifying no more treaties will meet both practical and philosophical concerns. It is however an isolationist strategy and inconsistent with agreed goals in the Pacific Plan. In the middle is the strategy of selective ratification. This would involve individual states prioritising areas for action, and pursuing ratification and implementation of specific treaties. A complementary strategy which could be pursued at the same time is to develop a regional rights mechanism. This strategy has significant potential in terms of providing a regional space to address philosophical concerns about human rights, and developing an appreciation of rights in the Pacific context.

To return to the question posed by this paper – to ratify or not to ratify? My tentative conclusion is a qualified "yes" to ratification. A strategy of selective ratification, combined with investigation of a complementary regional rights framework would gradually deliver many of the benefits of ratification. It would also address many of the practical concerns with ratification, and enable some consideration of the more deep-seated philosophical concerns.